Filed 9/1/06 P. v. Gallow CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SHAMARRA GLORIANN GALLOW et al., Defendants and Appellants.	C049653 (Super. Ct. No. 04F09077)

In this firearm case, we conclude: (1) the trial court did not abuse its discretion in ordering defendant Lucretia Gallow to be restrained during the trial; (2) there was insufficient evidence defendant Shamarra Gallow[1] actually or constructively possessed a short-barreled rifle; (3) the trial court committed harmless error in failing to instruct the jury on the knowledge element of the crime of possessing a short-barreled rifle; and (4) the trial court erred in ordering defendants to pay $2,440

[1] To avoid confusion, we will refer to defendants Lucretia Gallow and Shamarra Gallow by their first names.

each for the cost of their court-appointed attorneys subject to a determination of their ability to pay by the Department of Revenue Recovery. Accordingly, as to Shamarra we will reverse the judgment (order granting probation), but remand the case to the trial court for further proceedings on the issue of reimbursement of attorney fees at the election of the prosecution. As to Lucretia and defendant Joseph Singleton, we will affirm the judgments of conviction, but will reverse the reimbursement orders and remand their cases to the trial court for further proceedings on the reimbursement issue at the election of the prosecution.

FACTUAL AND PROCEDURAL BACKGROUND

In August or September 2004, Henrietta Cater sold her car to Lucretia for $300 or $400. When Lucretia failed to pay the entire purchase price, Cater took the car back, which made Lucretia "somewhat" mad. Lucretia later paid the remainder of the purchase price, and Cater thought the matter was over.

Late at night on October 16, 2004, Cater was driving with her fiancé, Marco Hamel, through the parking lot of her apartment complex when she saw Lucretia in a green BMW. Hamel got out of Cater's car and stepped in front of the BMW in an attempt to stop Lucretia so he could talk to her, apparently about an incident involving the flattening of the tires on Cater's car. Lucretia did not stop, however; instead, she drove forward into Hamel, who flew into the air and rolled onto the ground. Lucretia then drove away, and Cater took Hamel to a friend's apartment in the same complex.

After returning to her own apartment briefly, Cater drove back to pick up Hamel at the apartment where she had dropped him off. Before Hamel could get in the car, however, Cater saw Lucretia running nearby. Hamel pursued Lucretia on foot. As Cater followed in her car, "a couple of other girls," including Shamarra, appeared from behind some cars. Shamarra began throwing bottles at Cater's car. As Cater pulled her car out of the parking lot of the apartment complex onto the street, Singleton appeared. A woman Cater identified as Shamarra started screaming "shoot her, shoot her" as she was running nearby, and Cater saw Singleton standing in the middle of the street pointing a gun at her car. Cater drove off, eventually returning to park in back of the apartment complex so she could get to her apartment through the back gate.

As she walked to her apartment, Cater saw some lights from a car coming toward her and she hid behind a van. A white car with "a lot of people" inside pulled up near the front of Cater's apartment. Lucretia and Singleton got out of the car. Singleton had a "shotgun or something," which he aimed toward Cater's apartment. Lucretia said something to Singleton like, "don't do that" or "you don't need that gun." She then took a large rock out of the car and threw it through the window of Cater's apartment. Lucretia and Singleton got back in the car and drove away. Cater went inside and called the police.

Sometime later, Sacramento County Deputy Sheriff Duncan Brown was driving nearby looking for the white car when he heard a loud noise coming from a gas station. Deputy Duncan saw a

white car parked at the gas station and a person (later identified as Lucretia) on her knees leaning into the rear passenger door doing something on the floorboard of the car. Deputy Duncan pulled up and asked a group of five people who were standing near the back of the car what the noise was. Someone said they were throwing concrete into the dumpster. Deputy Duncan looked into the back of the car to see what Lucretia had been doing there and saw a rifle on the floorboard. Deputy Duncan drew his gun and ordered everyone to get on the ground.

Cater was later brought to the gas station, where she identified Singleton as the man with the gun, Shamarra as the person who yelled "shoot her, shoot her," and Lucretia as the person who threw the rock through her window.

The rifle found in the car was 24 inches long, with a barrel 13 inches long. Six to eight inches had been cut off the stock and five to six inches had been cut off the barrel.

After Lucretia was arrested, she told an officer that "a gentleman [who she had] been having problems with over some car deal" had "smashed out her car window" "earlier that night." She then went and got her sister (Shamarra) and her brother-in-law (Singleton), and they drove back to where the confrontation occurred. According to the officer, Lucretia told him, "We brought a gun, we brought a gun to scare them." Lucretia also said, however, that it was Singleton who had the gun.

Lucretia, Shamarra, and Singleton were charged together in a three-count information with the following crimes: (1) being

a felon in possession of firearm (Lucretia and Singleton); (2) possessing a short-barreled rifle (Lucretia, Shamarra, and Singleton); and (3) brandishing a firearm (Lucretia, Shamarra, and Singleton). The information also alleged that Lucretia had a prior strike conviction.

The case against all three defendants was tried to two juries simultaneously: one for Lucretia and one for Shamarra and Singleton.

The first jury found Lucretia guilty of all three crimes. The second jury likewise found Singleton guilty of all three crimes, but found Shamarra guilty only of possessing a short-barreled rifle, acquitting her of brandishing a firearm.

The trial court sentenced Singleton to an aggregate term of two years eight months in prison. After determining that Singleton's attorney was appointed rather than retained, the court stated, "based on the current fee schedule, the Court determined that the cost of your legal assistance . . . is $2,440 and I order you to pay this amount subject to a finding of the Department of Revenue . . . Recovery that you have the ability to pay that." Singleton's attorney responded, "It was my understanding that it is the policy of the County that when a subject is sentenced to state prison that attorney fees for appointed counsel are waived on an implied finding of an inability to pay." The court replied, "That's not mine. Although [if] he is determined to be unable to pay, of course he would not be required to pay, but I leave it up to the Department of Recovery."

The court then turned to Lucretia. After finding the strike allegation true, the trial court sentenced her to an aggregate term of four years in prison. The court then stated, "I'm also going to impose a cost of $2440 for attorney[']s fees payable to the County of Sacramento, assuming that the Department of Revenue Recovery determines that you are capable of making those payments."

The trial court then granted Shamarra probation, subject to a year in jail. The court also ordered her to pay $2,440 for her legal fees "subject to the Department of Revenue Recovery's determination that you are capable of making the payment."

The abstracts of judgment for Singleton and Lucretia provide, "Attorney fees in amount of $2,440.00 payable through the Court's installments process." The order of probation for Shamarra provides, "Pay Criminal Conflict Defender Fees of $2,440.00 for legal services provided[.] [¶] Defendant pay through the Court's installments process the amount determined after an evaluation and recommendation of ability to pay and for development of a payment schedule for court-ordered costs, fees, fines and restitution within five (5) days of sentencing or within five (5) days of release from custody."

All three defendants filed timely notices of appeal.

DISCUSSION

I

Shackling Of Lucretia

Lucretia was arrested on October 16, 2004, and remained in custody through trial in March 2005. On the first day of trial,

before jury selection began, the trial court took testimony from Sacramento County Sheriff's Deputy Shannon Schumaker regarding "restraint issues concerning" Lucretia. Deputy Schumaker, who was the officer in charge of the inmates on the jail floor where Lucretia was housed, testified that she had seen Lucretia behave aggressively and had observed different types of altercations in which Lucretia had been involved. According to Deputy Schumaker, the most recent event was three months earlier (in December 2004) when Lucretia "went after one of the inmates" during lunch. Lucretia did not stop when directed, but did stop without physical intervention when she saw five or six officers responding to the disturbance.

Deputy Schumaker had also seen Lucretia being physically aggressive (but not assaultive) toward inmates on at least four or five other occasions, although all of those events occurred "over a period of two to three years" prior to her arrest in October 2004. Deputy Schumaker had seen Lucretia curse at other officers, and Lucretia was written up for threatening an officer with bodily harm, but Deputy Schumaker had not seen Lucretia physically assault any officers working in the jail. Lucretia had had three or four "write-ups" since October 2004 and had admitted to having an "anger issue" for which she sought help from "jail psych services."

Deputy Schumaker testified that Lucretia was classified by the sheriff's department as a "total separation inmate" for any movement of her, which meant she was completely separated from other inmates and restrained with belly chains and shackles.

She further testified that it was her opinion that such procedure should be followed at trial.

The court asked Deputy Schumaker if chaining Lucretia to a security chair with her legs shackled but her hands free would present a security problem.[2] Deputy Schumaker answered that "it would depend on the supervisors at this facility."

When the court asked Deputy David Manning the same question, he responded, "Given the setting and the surroundings you are in right now, I wouldn't say her hands should be free with as many things in close proximity to her" which she could grab and throw. Deputy Manning also testified it was "the standard" that a total separation inmate remain chained when that person is on trial.

The matter was then submitted by counsel, and the court ruled that Lucretia "remain in belly chains, as the Sheriff[']s Department has requested." Lucretia's counsel asked to leave one hand free "so that she can write any questions or comments she has." The court asked another deputy who was present (Deputy Mary Bruni) what she thought, and she responded (not under oath), "It is my opinion and my experience that if she just had one hand free and all these things were out of reach, like the lamp and so on and so forth, with the deputy sitting

---

[2] A security chair "restrains a person around the waist in a manner not directly visible to the jury." (*People v. Hawkins* (1995) 10 Cal.4th 920, 943.)

here, I think that would be fine." The court replied, "All right. That's what we will do."

During the testimony of the first witness, the court announced outside the presence of the jury that it had a sua sponte duty to give "instruction 1.04 concerning the defendant in restraints" if Lucretia's restraints were visible, but it was "unclear" whether they were. The court decided to wait "to make a factual finding at some point about that."

At the end of that day's session, Lucretia's counsel said Lucretia's ankles were swollen because of the restraints and she wanted the court to get a "sick call" for her as it had the week before. The court stated it would ask a deputy to communicate to the jail the court's request that the nurse see Lucretia that evening.

The next day, Lucretia was moved to the witness stand outside of the jury's presence, but the court determined that "the jury will be able to see . . . that she is somewhat restrained." Accordingly, when the jury returned to the courtroom, the court instructed the jury that "[t]he fact that physical restraints have been placed on the defendant Lucretia Gallow must not be considered by you for any purpose. They are not evidence of guilt and must not be considered by you as evidence that she is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issue in this case, you are to disregard this matter entirely."

On appeal, Lucretia contends the trial court abused its discretion in ordering her to be restrained during the trial in belly chains, leg shackles, a wrist shackle, and a security chair because: (1) the court abdicated its discretion to the sheriff's deputies based on their policy for "total separation inmates"; (2) the court failed to consider the most unobtrusive and least restrictive method of restraint available; and (3) the court failed to consider the specific circumstances of her case.

The People contend these arguments were forfeited[3] by the failure of Lucretia's attorney to raise them in the trial court. We disagree.

"It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) The main reason for this rule is that "the potential harm is of a type that may be avoided if the matter is brought to the court's attention. A timely objection allows the court to remedy the situation before any prejudice accrues." (*People v. Taylor* (1982) 31 Cal.3d 488, 495-496 [jail versus civilian clothing].)

Here, the record is unclear exactly how the restraint issue was brought to the court's attention. What is clear, however,

---

[3] The People use the term "waived," but "forfeited" is more accurate. (See *People v. Collins* (2001) 26 Cal.4th 297, 305, fn. 2 ["'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right"'"].) Accordingly, forfeiture is the term we will use.

is that the court *did* address the need to restrain Lucretia and held a hearing on that issue before deciding to have Lucretia restrained. Thus, a record was made of the court's decision, which we can review. Under these circumstances, no further objection from Lucretia was required to preserve the restraint issue for appeal.

In *People v. Duran* (1976) 16 Cal.3d 282, our Supreme Court "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. . . . [I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances. [¶] In the interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Id.* at pp. 290-291, fn. omitted.)

More recently, the United States Supreme Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a court determination, in the exercise of discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." (*Deck v. Missouri* (2005) 544 U.S. 622, 629 [161 L.Ed.2d 953, 963].) The trial court's determination of the need for restraints, however, "must be case specific; that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial." (*Id.* at p. 633 [161 L.Ed.2d at p. 965].)

"[W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others." (*People v. Mar* (2002) 28 Cal.4th 1201, 1221.) "A trial court abuses its discretion if it abdicates this decision-making responsibility to security personnel or law enforcement." (*People v. Hill* (1998) 17 Cal.4th 800, 841.)

Lucretia contends that was the case here because the trial court abdicated its decision about restraints to the sheriff's deputies. To determine whether that is so, we turn first to the relevant cases.

In *People v. Jacla* (1978) 77 Cal.App.3d 878, the defendant was restrained in handcuffs and leg irons throughout his trial. (*Id.* at pp. 881-883.) The appellate court concluded the trial court abused its discretion in allowing the defendant to be shackled because, among other things, "[t]he trial court did not exercise its discretion; it delegated to the bailiff the question of what restraints, if any, were appropriate." (*Id.* at p. 885.) The court explained its ruling as follows:

"The record shows that the bailiff suggested the use of leg irons only. Counsel for appellant objected to any physical restraints. The trial court decided the matter by saying to the bailiff: 'You may use your discretion to keep a certain amount of security. Whatever you are satisfied you are safe with, all right.' Nothing further was said about what restraints should or would be imposed.

"It might well have been appropriate to solicit the opinion of the bailiff, the person responsible for the security of the courtroom, in the course of a judicial determination as to what restraints, if any, were necessary. But, the determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff." (*People v. Jacla*, *supra*, 77 Cal.App.3d at p. 885.)

In *People v. Jackson* (1993) 14 Cal.App.4th 1818, three defendants were placed in leg irons during their trial. (*Id.* at p. 1822.) "In response to the defendants' objections, the trial court said: 'Well, the security in this trial is going to be left up to the sheriff and my bailiff.'" (*Ibid.*) The court made other similar statements as well. (*Ibid.*) The appellate court concluded the trial court "abused its discretion in abdicating its responsibility for courtroom security to the bailiff and/or sheriff's personnel," even though the trial court later conducted a hearing on the issue of restraints and claimed it was *not* leaving the decision entirely up to the sheriff's department. (*Id.* at pp. 1822-1823, 1825.)

In *People v. Hill*, *supra*, 17 Cal.4th at page 800, the defendant was shackled with leg restraints. (*Id.* at p. 840.) On review, the Supreme Court concluded the trial court abused its discretion in allowing the defendant to be restrained because "the trial court failed to hold a hearing on, or otherwise determine for itself, whether adequate justification existed to physically restrain [the] defendant in the courtroom. Instead, the trial court deferred to the sheriff's department's decision that shackles were necessary. When [the] defendant complained about the decision to place him in leg restraints, the court explained that 'I don't interfere in [the sheriff's department's] business.' Later, when defense counsel asked whether it was necessary [the] defendant wear the chains, the court replied, 'I believe the [sheriff's] department has said so,' implying the court had no say in the matter. By failing to

determine independently whether, in its view, there existed a manifest need to place [the] defendant in restraints, the trial court abdicated its responsibility and abused its discretion." (*Id*. at p. 842.)

In *People v. Mar*, *supra*, 28 Cal.4th at page 1201, security personnel outfitted the defendant with a stun belt on the second day of trial testimony. (*Id.* at p. 1210.) When the defendant complained, the trial court allowed the belt to remain without conducting an inquiry into the reason for it. (*Id.* at pp. 1210-1213.) On review, the Supreme Court concluded the trial court abused its discretion because "in this case the security officials who placed the stun belt on [the] defendant made no on-the-record showing of any circumstances to support the imposition of a stun belt on [the] defendant and the trial court failed to require any such showing. Moreover, the record does not demonstrate that the trial court actually determined that [the] defendant posed the type of serious security threat at trial that would justify the imposition of restraints under the 'manifest need' standard of *Duran*." (*Id*. at p. 1220.)

This case is distinguishable from *Jacla*, *Jackson*, *Hill*, and *Mar* because, unlike the trial courts in those cases, the trial court here *did* conduct an inquiry into the need for restraints on Lucretia before allowing her to appear in restraints before the jury. Furthermore, unlike in those cases, the record here does not affirmatively show that the trial court left the ultimate restraint decision to courtroom security personnel. Essentially, Lucretia would have this court conclude the trial

court did so because "the trial court never used the phrase 'manifest need'" and "never stated that it believed [she] posed a 'serious security threat.'" Stated another way, because the trial court did not state on the record it was "applying the applicable legal principles to [her] specific circumstances, and never made any [express] finding regarding any conclusions it reached after listening to the testimony," Lucretia would have this court conclude that "[t]here was no due process determination by the court but only a rubber-stamp approval of the Sheriff's Department['s] policy regarding total separation inmates."

This argument ignores the fundamental principle of appellate law that "'[a]n order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.) We cannot presume from the trial court's failure to *expressly* find there was a manifest need for restraints that it did not, in fact, make such a finding. Given the trial court was aware of, and complied with, its obligation to conduct a hearing into the issue of restraints, we must presume the trial court was aware of the standards to be applied at such a hearing, and the trial court earnestly attempted to apply those standards in determining Lucretia should remain in restraints during the trial -- absent a showing of something in the record demonstrating otherwise. Having failed to make any such

showing, Lucretia has not shown the trial court abdicated its responsibility to determine the restraints issue.

That leads us to Lucretia's argument that the trial court abused its discretion by failing to consider the most unobtrusive and least restrictive method of restraint available. This argument fails for the same reason the last one failed -- just because the record is silent on whether the trial court considered less restrictive methods of restraint does not mean the trial court did not do so. Because Lucretia has not affirmatively shown that the trial court failed to consider other, less restrictive methods of restraint, she has failed to demonstrate an abuse of discretion in this regard.

Finally, we turn to Lucretia's argument that "the evidence in the record does not demonstrate that [she] posed the type of serious security threat that might justify the restraints actually used." With regard this argument, it is important to understand what information we do and do *not* consider in determining whether the trial court abused its discretion in ordering Lucretia restrained.

In arguing the trial court did abuse its discretion, Lucretia cites not only to the testimony at the hearing on the restraints issue but also to information contained in Lucretia's probation report, which was not prepared until after Lucretia was convicted. *That* information is irrelevant to our inquiry. Whatever the probation report may show about Lucretia's behavior in jail, that information was *not* before the trial court when it decided the restraints issue, and thus we cannot consider that

information in determining whether the trial court abused its discretion in deciding that issue. What is relevant for our purposes is only the information made known to the trial court *before* it decided to keep Lucretia restrained during trial.

As for that information, it came to the court solely through the testimony of Deputy Schumaker, who testified in substance that: (1) she had seen Lucretia demonstrate physically aggressive, but not assaultive, behavior toward other inmates four or five times over a period of two to three years prior to her arrest in October 2004;[4] (2) she had seen Lucretia engage in physically assaultive behavior toward another inmate only once, in December 2004, when Lucretia "went after one of the inmates" during lunch, stopping only when she saw five or six officers responding to the disturbance; (3) she had seen Lucretia curse at other officers, and Lucretia was written up for threatening an officer with bodily harm, but she had not seen Lucretia be physically assaultive toward any officers working in the jail; (4) Lucretia had had three or four "write-ups" since October 2004; and (5) Lucretia had admitted to having an "anger issue" for which she sought help from "jail psych services."

Given that the foregoing facts demonstrated no need for Lucretia to be restrained due to a risk of escape, the question is whether the trial court could have reasonably concluded the

---

[4] Deputy Schumaker was not asked to explain what kind of behavior she characterized as aggressive but not assaultive.

foregoing facts demonstrated a manifest need for Lucretia to be restrained during trial in a security chair with belly chains, leg shackles, and a wrist shackle to maintain security in the courtroom. We believe the answer to that question is "yes."

"'Manifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .'" (*People v. Cox* (1991) 53 Cal.3d 618, 651, quoting *People v. Duran*, *supra*, 16 Cal.3d at p. 292, fn. 11.) Here, Lucretia engaged in violent, nonconforming conduct when she attacked a fellow inmate in jail three months before trial. She also engaged in nonconforming conduct when she was physically aggressive toward other inmates on four or five occasions, when she cursed at officers, and when she threatened at least one officer with bodily harm. Under these circumstances, we cannot say the trial court abused its discretion -- i.e., acted outside the bounds of reason (see *People v. Catlin* (2001) 26 Cal.4th 81, 122) -- in finding there was a manifest need for Lucretia to be restrained during trial.

II

Sufficiency Of The Evidence Supporting Shamarra's Conviction For Possessing A Short-Barreled Rifle

Shamarra contends the evidence is insufficient to support her conviction of possessing a short-barreled rifle. We agree.

"'The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the

judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] "'[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.] "The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.'"' [Citation.]

"'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].'" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572-1573.)

"A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or

control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others." (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083-1084.)

The People prosecuted the possession charge against Shamarra on a theory of constructive, rather than actual, possession. Thus, the question is whether there is substantial evidence in the record that Shamarra had the rifle under her dominion and control, either directly or through others.

The evidence showed the rifle was in the white car at the same time Shamarra was, and she knew it. That alone, however, is not enough to support a finding of constructive possession. "'"[D]ominion and control are essentials of possession, and they cannot be inferred from mere presence or access. Something more must be shown to support inferring of these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight. [Citations.] It is clear, however, that some additional fact is essential."'" (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.)

People v. Hunt (1963) 221 Cal.App.2d 224 provides an example of some additional facts that can support a finding of possession of a firearm by someone who was in a car where the firearm was found. There, the evidence showed, among other things, that "the gun was in a car owned and being driven by [the defendant]; . . . the gun was within his immediate reach and was readily accessible to him; [and the defendant] had in

his pocket five .22-caliber cartridges which were usable in the gun." (*Id.* at p. 225.)

Here, in contrast to *Hunt*, the evidence showed the car did not belong to Shamarra and Shamarra sat in the front seat, while the rifle was on the floor in the back seat, where Singleton and Lucretia sat. Accordingly, we must look for some other fact (if there is one) to sustain Shamarra's conviction.

Citing *People v. White* (1958) 50 Cal.2d 428 -- a drug possession case -- the People contend the necessary additional fact can be found in the evidence that, as Singleton pointed the rifle at Cater in her car, Shamarra was shouting "shoot her, shoot her." According to the People, Shamarra "had . . . Singleton acting as her agent in not only possessing the rifle, but in attempting to get Singleton to take the additional step of actually using it on [Cater]."

The People's reliance on *White* is misplaced. In *White*, the police followed a known user of narcotics (Hanick) to an apartment shared by the defendant and another man named Conover. (*People v. White*, *supra*, 50 Cal.2d at pp. 429-430.) Following the arrest of Hanick and Conover, the police found a capsule of heroin in a watch box on a dresser, where Conover had said it would be. (*Id.* at p. 430.) The defendant later told the officers "he had some heroin in the apartment and that it was probably in the box on top of the dresser." (*Ibid.*) He explained that "he had not seen the capsule of heroin which was in the room but that he had left money with Conover for the purchase of heroin from Hanick." (*Ibid.*)

In affirming the defendant's conviction for possessing narcotics over a challenge to the sufficiency of the evidence, the appellate court explained that "evidence of physical possession by the defendant's agent, or by any other person when the defendant has an immediate right to exercise dominion and control over the narcotic, has been held sufficient to sustain a conviction . . . . Conover purchased the heroin as an agent for [the defendant] and pursuant to his express instructions, and [the defendant], as the owner of the capsule, was entitled to exercise dominion and control over it. He had constructive possession as soon as the narcotic was acquired for him, and it is immaterial whether he had personal knowledge of the presence of the narcotic in the apartment." (*People v. White*, *supra*, 50 Cal.2d at p. 431.)

The foregoing facts are in no way comparable to the facts here. There was no evidence the rifle belonged to Shamarra, that Singleton was carrying it at her direction or behest, or that she had any right at all to tell Singleton what to do with the rifle. Even if the jury credited Cater's testimony that Shamarra was the person yelling "shoot her,"[5] Shamarra's urging of Singleton to use the rifle in his possession -- without any

---

[5] There is reason to question whether the jury believed this aspect of Cater's testimony because: (1) Cater testified Shamarra was running as she was yelling; (RT 131) (2) Shamarra testified she has cerebral palsy and has trouble even walking; and (3) the jury *acquitted* Shamarra of brandishing the rifle on an aiding and abetting theory, which was premised on Cater's testimony that Shamarra was the one who yelled "shoot her."

other evidence that she had a right to dominion and control over the rifle -- does not prove Singleton was "acting as her agent" in possessing the rifle, as the People claim.

The People's only other argument in support of Shamarra's conviction is their suggestion that, regardless of whether Shamarra herself constructively possessed the rifle, she was liable for aiding and abetting Singleton's possession of the rifle "through her encouragement and cooperation in the clearly cooperative enterprise of chasing and harassing [Cater] and encouraging Singleton to use the firearm." In support of that argument, the People cite footnote 3 in *People v. Bland* (1995) 10 Cal.4th 991, 998. That footnote is of no assistance, however, because it simply explains that the firearm sentencing enhancement in subdivision (a)(2) of Penal Code section 12022 does not require personal possession of a firearm; instead, the enhancement applies to any person who is a principal in the underlying offense as long as one or more of the principals was personally armed. Obviously, this point has nothing to do with whether a defendant can be convicted of a substantive offense based on possession of a firearm on the theory that he or she aided and abetted another person's possession of that firearm. On that point, the People offer no authority.

We note also that at trial the prosecutor expressly informed the jury that she was *not* relying on an aiding and abetting theory to support the possession charge, when she argued as follows: "Shamarra Gallow and Lucretia Gallow aided and abetted Mr. Singleton in committing the brandishing against

Henrietta Cater. [¶] So the aiding and abetting instruction that we talked about and the rules associated with aiding and abetting apply to whether or not these individuals helped with the brandishing. [¶] When we talk about the possession of the firearm, it's a different analysis. The question is not whether they aided and abetted Mr. Singleton to possess the gun. The question is whether they possessed the gun."

Given that the prosecutor specifically eschewed any reliance on aiding and abetting as a theory for Shamarra's guilt on the possession charge, it would be improper for us to rely on that theory now to uphold the jury's verdict.

That leaves us with only one more fact that might support the possession charge against Shamarra. At trial, the prosecutor alluded to Lucretia's statement to the officer, "We brought a gun," as evidence that Shamarra possessed the rifle along with Lucretia and Singleton. We do not believe, however, that that statement, without more, is sufficient to support a reasonable inference that Shamarra in particular had dominion and control over the rifle such that it could be deemed to be in her constructive possession. Indeed, even the People on appeal no longer attempt to rely on that evidence to support Shamarra's conviction.

For the foregoing reasons, we conclude the evidence was not sufficient to support Shamarra's conviction of possessing a

short-barreled rifle. Accordingly, we will reverse the judgment (order granting probation) as to Shamarra.[6]

III

Instruction On Possession Of A Short-Barreled Rifle

On count two -- possession of a short-barreled rifle (Pen. Code, § 12020, subd. (a)(1)) -- the trial court instructed the jury with CALJIC No. 12.40, in relevant part as follows: "In order to prove this crime, each of the following elements must be proved: [¶] One, a person manufactured or possessed a short-barreled rifle. [¶] Two, the instrument or weapon was of the kind commonly known as a sawed-off rifle. [¶] This means a weapon made from a rifle, whether by alteration, modification or otherwise, if that weapon as modified has an overall length of less than 26 inches or a barrel of less than 16 inches in length."

Singleton contends the court prejudicially erred in giving this instruction because "[t]he court did not instruct the jury

---

[6] Because we reverse the judgment as to Shamarra based on the insufficiency of the evidence, we need not address her argument that the trial court erred in failing to give, sua sponte, appropriate accomplice instructions. We also need not address this argument with respect to Singleton. He purports to join in all the arguments of Lucretia and Shamarra "to the extent that he could benefit from those arguments." We see no way in which Singleton could benefit from Shamarra's argument on accomplice instructions, as the prejudice portion of that argument is targeted specifically to the lack of possession evidence against Shamarra. Since Singleton offers no separate prejudice argument himself, based on the evidence against him, we conclude he did not intend to join in Shamarra's argument based on the trial court's failure to give accomplice instructions.

that there was any requirement that [he] have any form of guilty intent, knowledge or negligence." Lucretia joins in Singleton's argument.

In *People v. King* (2006) 38 Cal.4th 617, the California Supreme Court concluded "that section 12020(a)(1) is not a public welfare offense, and that the prosecution must prove the possessor's knowledge of the weapon's illegal characteristics," but "[t]he prosecution need not prove the defendant's knowledge of the rifle's precise length." (*Id.* at pp. 620, 627.) The court further concluded, however, that failure to instruct on the knowledge element of the crime was harmless under any standard because "[t]he undisputed evidence presented at trial showed that [the] defendant was aware of the shortness of the rifle he was charged with possessing [which was 24 1/8 inches long], because he admitted he had seen it in the drawer of a workbench in the garage and 'probably picked it up to look at it.'" (*Id.* at p. 628.)

Here, Singleton contends the error in instructing the jury was *not* harmless as to him because "the evidence does not establish that [he] was aware the rifle . . . was unusually short." In support of this argument, Singleton relies on Lucretia's testimony that he "did not become aware of the firearm until he and his companions were near the apartment complex," at a time when "the conditions were dark." According to Singleton, "Because of the dark conditions, the jury could rationally conclude there was a reasonable doubt that [he] was aware the rifle was unusually short."

Singleton's argument fails because he ignores Cater's testimony that he actually *held* the rifle and aimed it toward her in her car -- testimony the jury necessarily credited in finding Singleton guilty of brandishing a firearm. The evidence showed the rifle had been shortened at both ends, with six to eight inches cut off the stock and five to six inches cut off the barrel. The length of the barrel was 13 inches, three inches shorter than allowed by law, and the overall length of the rifle was 24 inches, two inches shorter than allowed. A photograph of the rifle admitted into evidence shows an obviously shortened stock wrapped in what appears to be black electrical tape.

Holding this shortened rifle in his hands, even in "dark conditions," Singleton "was necessarily aware of the weapon's shortness, which is the characteristic that makes its possession illegal." (*People v. King*, *supra*, 38 Cal.4th at p. 628.) Accordingly, "the trial court's failure to instruct the jury that [Singleton's] knowledge of the rifle's illegal characteristic was an element of the crime charged was harmless under any standard." (*Ibid.*)

The same conclusion applies to Lucretia. The evidence -- which the jury apparently credited in convicting Lucretia of all three charges against her -- showed Lucretia was aware of the rifle Singleton had because, among other things, she told him not to use it when they pulled up to Cater's apartment. More importantly, when Deputy Duncan found the group at the gas station, Lucretia was doing something on the floorboard of the

rear passenger side of the car, which is where the rifle was found. Under these circumstances, we are convinced beyond a reasonable doubt that even if the jury had been instructed on the knowledge element of the possession offense, the jury would have found Lucretia knew of the shortness of the rifle she constructively (if not actually) possessed. Accordingly, the error was harmless.

IV

Reimbursement For Cost Of Legal Assistance

Lucretia (joined by Shamarra and Singleton) contends "[t]he trial court erred in ordering that [she] pay $2440 in attorney's fees" because "[t]he amount was not supported by any evidence, and there was no finding of unusual circumstances as required by [Penal Code] section 987.8, subdivision (g)(2)(B)."[7]

Subdivision (b) of Penal Code section 987.8 provides as follows: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may,

---

[7] We consider Shamarra's challenge to the reimbursement order, even though we have determined already that the judgment (order granting probation) against her must be reversed for lack of evidence, because an order to reimburse the cost of legal assistance under section 987.8 can be made even if the defendant is acquitted. (See § 987.8, subd. (b) [reimbursement statute applies "[i]n *any* case in which a defendant is provided legal assistance"], italics added.)

after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

Subdivision (g)(2) of the statute defines "ability to pay" as "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her." That subdivision further specifies that "ability to pay" includes, but is not limited to, "[t]he defendant's present financial position," "[t]he defendant's reasonable discernible future financial position," "[t]he likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing," and "[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the cost of legal assistance provided to the defendant." (§ 987.8, subd. (g)(2)(A)-(D).) Subdivision (g)(2)(B) also provides that "[i]n no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position" and "[u]nless the court finds unusual circumstances, a defendant sentenced to state prison shall be

determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense."

The People contend Lucretia forfeited her challenge to the reimbursement order by failing to object to the order in the trial court. Citing *People v. Viray* (2005) 134 Cal.App.4th 1186, Lucretia contends she did not forfeit her challenge because: (1) "a claim of insufficiency of the evidence is not waived by the failure to object"; and (2) "defense counsel cannot be expected to object to an order for his own legal costs."

In *Viray*, the appellate court explained that "unless the defendant has secured a new, independent attorney when [the trial court makes an order for reimbursement of counsel fees], she is effectively *unrepresented* at that time, and cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees." (*People v. Viray*, *supra*, 134 Cal.App.4th at p. 1214.) The court also concluded that a challenge to the sufficiency of the evidence to support such an award in particular "requires no predicate objection in the trial court." (*Id.* at p. 1217, citing *People v. Butler* (2003) 31 Cal.4th 1119, 1126.)

The People contend *Viray* was "wrongly decided" because "[s]etting the amount of attorney fees pursuant to [Penal Code] section 987.8 is far different from establishing an element of an offense beyond a reasonable doubt. The statute provides only for notice and a hearing, which appellant received, not proof beyond a reasonable doubt, by a preponderance, or any other

defined standard. So long as the amount appears reasonable and appellant had the opportunity to be heard, the requirements of the statute have been met."

We are not persuaded. First, the People's argument addresses only one part of the rationale in *Viray*. In addition to concluding that a challenge to the sufficiency of the evidence can be raised for the first time on appeal, the court in *Viray* concluded that a defendant cannot be held responsible for the failure of his appointed attorney to object to an order reimbursing his own fees because of "the patent appearance of at least a vicarious adversity of interests." (*People v. Viray*, *supra*, 134 Cal.App.4th at p. 1216.) The People do not even attempt to explain why we should reject this reasoning.

Secondly, even as to that part of *Viray*'s rationale they *do* address, the People's argument falters. The People's argument in this regard rests on the suggestion that only a challenge to the sufficiency of the evidence of the *crime itself* can be raised for the first time on appeal, but this is plainly not so. In *People v. Butler*, *supra*, for instance, the Supreme Court held that a challenge to the sufficiency of the evidence supporting an order for involuntary HIV testing under Penal Code section 1202.1 can be raised for the first time on appeal. (31 Cal.4th at p. 1123.) The People offer no reason why the same rule should not apply to an order under Penal Code section 987.8 requiring the defendant to pay the cost of legal assistance provided through the public defender or private counsel appointed by the court. If there is any substantial evidence in

the record supporting the trial court's determination of the cost of a defendant's legal assistance, then we will affirm the court's order in any event. But where there is *no* such evidence, the People would still have us affirm the award "[s]o long as the amount appears reasonable," even though the absence of any evidence relating to the cost of the defendant's legal assistance deprives us of any basis whatsoever for judging the reasonableness of the amount. We will not adopt such a nonsensical approach. Accordingly, we agree with the court in *Viray* that a challenge to an order requiring the defendant to reimburse the cost of his or her legal assistance can be raised for the first time on appeal.

Here, there is *nothing* in the record supporting the trial court's determination that the cost of providing legal assistance to each defendant in this case was $2,440. With respect to Singleton, the trial court did state that the amount was "based on the current fee schedule," but that was all. That was not enough. In the absence of *evidence* in the record supporting the trial court's determination that it cost $2,440 to provide legal assistance to each defendant in this case, that determination cannot stand.[8]

---

[8] If defendants received legal assistance pursuant to a contract fixing the actual cost of a particular case (as suggested by the trial court's reference to a "fee schedule"), then evidence of that fee schedule would likely be sufficient to support the trial court's determination. (See *People v. Harrison* (1981) 118 Cal.App.3d Supp. 1, 6.) Unfortunately,

We also note a further problem with the reimbursement orders as to Lucretia and Singleton. Penal Code section 987.8 provides that in lieu of the trial court itself determining the defendant's ability to pay, "The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Pen. Code, § 987.8, subd. (b).) Presumably the trial court here intended to act under this provision when it made its reimbursement orders subject to a finding by the Department of Revenue Recovery of the defendants' ability to pay. The problem is that the court did not order the defendants to appear before the Department of Revenue Recovery -- as the statute allows -- and had it done so, Lucretia and Singleton would have been unable to comply with such an order because the court remanded them both into custody to begin serving their prison sentences. Thus, at least with respect to Lucretia and Singleton, if the court intended to make a reimbursement order under Penal Code section 987.8, it needed to make the determination of their ability to pay itself, rather than delegating that determination to a county department before which Lucretia and Singleton had no ability to appear.

For the foregoing reasons, we will reverse the reimbursement orders as to Lucretia and Singleton and will

---

there is no evidence of any such contract in the record before us.

remand their cases, along with Shamarra's, to the trial court for further proceedings on the issue of reimbursement of attorney fees at the election of the prosecution. (See *People v. Butler*, *supra*, 31 Cal.4th at p. 1129.)

DISPOSITION

As to Shamarra, the judgment (order granting probation) is reversed, and the case is remanded to the trial court for further proceedings on the issue of reimbursement of attorney fees. As to Lucretia and Singleton, the judgments of conviction are affirmed, but the orders for reimbursement of the cost of legal assistance are reversed and the cases are remanded to the trial court for further proceedings on the issue of reimbursement of attorney fees.

ROBIE, J.

We concur:

DAVIS, Acting P.J.

HULL, J.